Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD., Petitioner

vs.

STEVE CONRAD, ET AL., Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Respondents in this cause respectfully submit that no Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals For The Sixth Circuit which affirmed the judgment and opinion of the United States District Court, Judge Frank Wilson presiding.

OPINIONS BELOW

The opinion of the Court of Appeals filed May 30, 1973, and its opinion on Petition to Rehear With Suggestion for Rehearing En Banc, filed October 30, 1973, are reported at 486 Fed. 2d 894 and are appended to the Petition for a Writ of Certiorari. The opinion of the United States District Court For The Eastern District of Tennessee, Southern Division, is reported at 341 F.Supp. 465 (1972).

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

May a municipal auditorium board refuse to lease the auditorium for a production which would avowedly violate laws against public nudity and the performance of obscene acts in public places, and which would thereby also violate the terms of the form lease upon which the municipal facilities are standardly let.

CONSTITUTIONAL PROVISIONS INVOLVED

Plaintiffs-petitioners aver that the First and Fourteenth Amendments are involved, which defendants-respondents deny, averring that the police power gives them the right to proscribe the conduct involved in a municipal facility.

STATEMENT OF THE CASE

A. Proceedings in the District Court.

On September 11, 1970, the plaintiff requested of the defendant auditorium board the right to lease the Tivoli

Theatre, a privately owned theatre under lease to the City of Chattanooga, at some indefinite subsequent time to present performance (s) of "Hair." The request was denied. Again, on April 2, 1971, the same request was again made and denied. Upon October 29, 1971, the request was again made, this time specifying the dates of November 23-28 as the desired time for the exhibition. The request was again denied, and this action was brought two days later, just three weeks and one day before the desired dates. The Complaint ftself averred, *inter alia,* that nudity would occur.

Plaintiff's original pleading sought: (1) a temporary restraining order enjoining the auditorium board from leasing the Tivoli on the dates in question, and (2) preliminary injunctive relief to grant the ultimate relief sought, an injunction enjoining defendants mandatorily to contract with the plaintiff for the use of the appropriate Tivoli Theatre facilities during the period mentioned above "upon normal, standard and customary terms and conditions for like performances of musical stage plays." (Complaint, pp. 7-8)

On November 4, 1971, a show cause hearing was held during which the board interposed, *inter alia,* the defense that the exhibition sought to be performed, even under the allegations of the complaint, would violate certain ordinances of the City of Chattanooga, and thereby would violate the very terms of the standard lease plaintiff was seeking.

For reasons set forth in the Court's Memorandum Opinion of November 8, 1971, the preliminary relief prayed, which was in effect the ultimate relief sought, was denied (Order of Nov. 9, 1971). Thereafter, the auditorium board filed a motion to dismiss. Two of the grounds relied upon by the board in its motion were: (1) that

the complaint failed to state a cause of action in that the plaintiff had no right to contract with the board because it had averred that acts would be performed in public which violated both ordinances of the City of Chattanooga and the common law of Tennessee on indecent exposure, and that said acts would thereby be a violation of the terms of the standard lease; and (2) that the complaint failed to state a substantial federal question or constitutional issue.

The motion to dismiss was taken under advisement by the Court; and thereafter, on March 16, 1972, plaintiff amended its complaint to request the booking date of April 9, 1972, at the Memorial Auditorium, and the plaintiff further asked for an expedited hearing. Subsequently, on March 23, 1972, the judgment on the motion to dismiss was reserved; the defendants were given just ten (10) days in which to answer; and the cause was set for hearing on the 10th day, April 3, 1972.

Defendants' answer was filed March 31, just eight (8) days later, in an attempt to give both the Court and opposing counsel notice of their defenses in advance of the hearing, and while relying on the motion to dismiss, the answer averred, *inter alia,* (1) violations of the obscenity laws of the city and state would occur if plaintiff were successful; (2) that no First Amendment rights were involved because the First Amendment does not protect conduct which is contrary to a valid state law upholding a substantial state interest; and (3) that the First Amendment does not protect obscene conduct such as that plaintiff sought to exhibit to the public.

The cause came on to be heard on April 3, 1972, and the ensuing days. Issues were then submitted to an advisory jury, empaneled by the Court, they being: (1) whether the production "Hair" was obscene within the

definition of obscenity as it relates to freedom of speech under the First Amendment; and (2) whether conduct, apart from speech or symbolic speech in the production "Hair," was obscene within the definition of obscenity as it relates to conduct.

Both the advisory jury and the Court found that the production "Hair" contained conduct, apart from speech or symbolic speech, which rendered it in violation of both the public nudity ordinances of the City of Chattanooga and the obscenity ordinances of the City and of the statutes of the State of Tennessee. This conduct was, in fact, never denied by plaintiffs. It was, therefore, held that the defendants accordingly acted within their lawful discretion in declining to lease the Municipal Auditorium and the Tivoli Theatre to the plaintiff.

Further, the Court held that even on the assumption that the alleged communicative element of the exhibition brought into play the First Amendment, the laws in question met the tests set forth in *U. S.* v. *O'Brien,* 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968), and that the defendant board was justified in denying plaintiff access to the auditorium.

B. Proceedings In The Court Of Appeals.

On appeal from the District Court, the Court of Appeals affirmed the judgment on the opinion of the District Judge, with both Judges Weick and O'Sullivan adding comments after adopting the opinion of the District Judge. It found the conduct, the language used, and the play itself all obscene. Plaintiffs filed a Petition to Rehear with a Suggestion For Rehearing En Banc. The Suggestion was overruled 7-2 and the Petition to Rehear denied by the same majority which originally affirmed the decision below.

BRIEF AND ARGUMENT

REASONS FOR NOT GRANTING A WRIT OF CERTIORARI

1. Circuit Courts of Appeal Are Not In Irreconcilable Conflict

Respondents respectfully submit that even though the Fifth and Tenth Circuits reached opposite results in other cases involving "Hair" as alleged by petitioner, than did the Sixth Circuit Court of Appeals in this case, the decisions are not in conflict because only in the case at bar was the *conduct* which would take place raised – this issue was not raised or decided in any of the three cases cited by petitioner *Southeastern Promotions, Ltd.* v. *City of West Palm Beach,* 457 F.2d 1016 (5 Cir. 1972); *Southeastern Promotions, Ltd.* v. *Oklahoma City, Okla.,* 459 F.2d 282 (10 Cir. 1972); or *Southeastern Promotions Ltd.* v. *City of Mobile, Ala.,* 457 F.2d 340 (5 Cir. 1972). Instead those decisions were decided on the bases that (1) a city could not decline use of its auditorium because the auditorium was operated as a proprietary function rather than as a governmental function, and (2) a city could not decline use of its facilities merely because its public officials did not care for the philosophical or ideological content of programs using the facility. In none of these decisions, to respondents' knowledge, was the illegality of the conduct occurring on stage, and particularly that which was not illustrative of any idea, speech, dialogue or theme of the production raised, and further, to respondents' knowledge, none of the other decisions involved the question of obscenity *vel non*.

Respondents herein also raised the issues on which their counterparts lost in the other jurisdictions, but they also asserted the "conduct" argument and brought into issue obscenity *vel non* which was not decided by the other courts mentioned. Even though the final results were opposite, since this decision was made on the additional grounds raised herein and not raised in the other cited cases, the Circuit Courts of Appeal are not in conflict. The District Court herein decided the issues raised in the Fifth and Tenth Circuits in accord with those decisions.

It should also be noted in this regard that the evidence introduced in the case at bar differed markedly from that in the other mentioned cases and appears, from the opinions, to be much more exhaustive. Since obscenity is a mixed question of law and fact, it is understandable that different courts could reach different results based upon the proof introduced before them. This too serves to reconcile the facially different results reached by the Sixth Circuit Court of Appeals.

Hence, it is respectfully submitted that the Courts of Appeals are not in irreconcilable conflict and it is not necessary to further resolve this matter.

2. The Issue Is Not of Enough Significance to Justify Review

The petitioner alleges that the issue is one of great importance to the American theatre but fails to specify which issue is important to the theatre: what obscenity standards may be applied to the theatre or whether judges may find conduct obscene without having seen the conduct involved.

If it refers to the latter, respondents are unaware of any decision of any court declaring that a judge must himself see conduct before declaring the conduct illegal or punishing a violator of laws proscribing illicit conduct.

Further, the allegation that the Court must see the production seems particularly inappropriate in the instant case, in that plaintiff herein never moved, requested of, or in any way mentioned to the District Judge that he should see the production. Instead, petitioner, by demanding immediate trials and expedited hearings both times it came before the District Court never gave the Court time to see the production. The record reflects that initially defendants and the Court were given only five days notice before a show cause hearing was held and then after defendants later filed a Motion to Dismiss, part of which was eventually sustained, but while said Motion was pending, plaintiff again came to the Court and asked for and was given an expedited hearing. Obviously, plaintiff's deliberate "last minute" tactics impaired any opportunity the Court might have had to see the play and plaintiff cannot now be heard to complain.

Further, and even more ruinous to the petitioner's position, is that it alone was in control of the acting company and it alone could have brought the players in for a private showing for the Court. Yet despite the fact that petitioner alone had the power to provide the Court this evidence, it chose not to do so. It goes without saying that theatrical productions, unlike obscene books and movies, are not available to both sides. It having been within the power of plaintiff to provide this evidence, and it not having done so, petitioner cannot now be heard to complain. *Transamerica Ins. Co.* v. *Bloomfield*, 401 F.2d 357 (6th Cir. 1968).

If, on the other hand, petitioner is alleging that it is of importance to the theatre to know whether any act that it cares to portray on stage *ipso facto* becomes enshrouded

by the First Amendment, that issue has been passed upon by this Court. In *Paris Adult Theatre I* v. *Slaton*, — U.S. —, 37 L.Ed.2d 446, 93 S.Ct. —, this Court said:

> "*Conduct or depictions of conduct that the state police power can prohibit on a public street does not become automatically protected by the Constitution merely because the conduct is moved to a* bar or a *'live' theatre stage*, any more than a 'live' performance of a man and woman locked in sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue." (emphasis supplied)

The District Court and Court of Appeals both herein found that many illegal and obscene acts occurred in the production which did not relate to any free speech involved, just as in the example this Court cited in *Paris Adult Theatre (supra)*. The District Judge went on to hold:

> "It is clear to this Court that conduct, when not in the form of symbolic speech or so closely related to speech as to be illustrative thereof, is not speech and hence such conduct does not fall within the freedom of speech guarantee of the First Amendment."

This Court has often held that the mere fact that free speech is intermingled with illegal conduct does not bring with the free speech constitutional protection for the conduct. *Cox* v. *Louisiana*, 379 U.S. 536, 13 L.Ed 2d 471, 85 S.Ct. 453 (1965); *Cox* v. *Louisiana*, 379 U.S. 559, 13 L.Ed.2d 487, 85 S.Ct. 476, reh. den. 380 U.S. 926, 13 L.Ed.2d 814, 85 S.Ct. 879 (1965); *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490, 93 L.Ed. 834, 69 S.Ct. 684 (1949); *U. S.* v. *O'Brien*, 391 U.S. 367, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968); *Paris Adult Theatre I* v. *Slaton*, *supra*; *Cameron* v. *Johnson*, 390 U.S. 611, 20 L.Ed.2d 182,

88 S.Ct. 1335, reh. den. 391 U.S. 971, 20 L.Ed.2d 887, 88 S.Ct. 2029.

Furthermore, in *Miller* v. *California*, — U.S. —, 37 L.Ed.2d 419, 93 S.Ct. — (June 21, 1973), this Court stated:

> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accomodation any more than live sex and nudity can be exhibited or sold without limit in such public places.[8]"

> "[8] Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In *United States* v. *O'Brien*, 391 U.S. 367, 377, 20 L.Ed.2d 672, 88 S.Ct. 1673 (1968) a case not dealing with obscenity, the Court held a State regulation of conduct which embodied both speech and nonspeech elements to be sufficiently justified if . . . it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restrictions on alleged First Amendment freedoms is no greater than is essential to the furtherence of that interest.[1] See *California* v. *LaRue*, 409 U.S. 109, 117-118, 34 L.Ed.2d 342, 93 S.Ct. 390 (1972)."

In this regard it is of great importance to note that, even though the decision in the case at bar pre-dated *Miller* by more than a year, the District Judge specifically found that the laws relied upon by respondents met all of the standards laid down in *United States* v. *O'Brien*, and that respondents refusal to contract with petitioner was therefore sufficiently justified.

Hence, it is respectfully submitted that this case presents no new issues to this Court significant enough to justify review, and clearly the judgment is supported by the case law of this Court.

3. The Standards Applied Are Not Inconsistent With Previous Decisions of This Court

Petitioner further alleges that this Court should grant certiorari because of an alleged lack of constitutionally accepted standards governing use of the auditorium. Then petitioner forgot to mention that portion of the lease (p. 35, l. 28 of Petition for Certiorari) which requires all lessees to abide by all state and local laws, which laws include those footnoted to the District Court decision and which appear on page 36 of the Petition for Certiorari.

That the defendant board has not exercised an unfettered discretion as alleged by petitioner is obvious. Certainly there is no impermissible vagueness or indefiniteness in an ordinance which prohibits public nudity, and there can be no question that public nudity occurs in "Hair" — this was admitted in the Complaint. Where is the vague standard?

Similarly, lewd, indecent and obscene acts in a public place are proscribed (see Ordinance 25-28). This is almost exactly the same language of the statutes upheld in *Roth* v. *U.S.*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957), the only difference being that there they were applied to written material whereas here they are applied to conduct. The appellant in *Roth* argued that the words, "obscene", "lewd", "lascivious", "filthy", and "indecent" were not sufficiently precise, but this Court expressly rejected this contention, citing extensive authority (354 U.S. 491, 492, 1 L.Ed.2d 1510, 1511). As the Court there said:

> "These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '. . . boundaries sufficiently distinct for judges and juries fairly to administer the law . . . That there may be marginal cases in which it is difficult to de-

termine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense.' "

Here there can be no doubt that these words and standards apply to the conduct in "Hair". This is not even a marginal case. The jury, after being properly instructed, the District Judge and the Court of Appeals concurred with the board. It is therefore manifest that the board's action was neither arbitrary nor capricious.

The standards having been adequately set forth and being sufficiently precise, particularly with respect to the conduct in "Hair", it is respectfully submitted that appellant's argument in this regard is without merit.

4. Mootness

Upon information and belief, respondents submit that the issues involved in this case are now moot. It is respondents information that the road company, the Venus Company, which was playing "Hair" and which was to come to Chattanooga if plaintiff had prevailed, has now gone off the road and is no longer playing "Hair."

The testimony below was that it was not until October or November of each season that it could be determined whether a road show would continue to draw large enough audiences to make it financially feasible to continue for the full season. Respondents are informed that plaintiff did not show "Hair" at Chattanooga's sister city of Knoxville, Tennessee. Even though under threat of a lawsuit by plaintiff herein, that city had agreed to and did set aside a week of scheduling at its auditorium last January, but plaintiff failed to stage its production.

This being the case, it is respectfully submitted that the dismissal of this cause should be allowed to stand.

CONCLUSION

For the foregoing reasons it is respectfully submitted that a writ of certiorari should not be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

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